IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

REBECCA FAILING,	:	
	:	C.A. No. K18A-07-002 WLW
Employee-Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
STATE OF DELAWARE,	:	
	:	
Employer-Below,	:	
Appellee.	:	

Submitted: December 3, 2019
Decided: February 25, 2019

ORDER

Upon an Appeal from the Decision of the
Industrial Accident Board
Affirmed.

Walt F. Schmittinger, Esquire and Candace E. Holmes, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Appellant.

Benjamin K. Durstein, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorney for Appellee.

WITHAM, R.J.

INTRODUCTION

Appellant Rebecca Failing ("Appellant") appeals from an adverse decision by the Delaware Industrial Accident Board ("the IAB" or "the Board") in favor of the State of Delaware ("the State"). The Appellant suffered injuries in a work accident and as a result required treatment from specialists at the University of Pennsylvania, located in Philadelphia, Pennsylvania.

Despite being reimbursed $761.20 for mileage over a ten-month period, the Appellant requested an additional reimbursement of $114.75 for tolls and parking expenses and was denied by the Board. The IAB found that pursuant to section 2322(g), the Appellant could only be reimbursed with mileage related to travel for treatment. The Board opined that if the Legislature intended for tolls and parking to qualify for reimbursement, it must amend section 2322(g) because the IAB did not have authority to read language into a clear and unambiguous statutory provision.

After consideration of the parties' arguments and the record, the Court finds that the Board's decision is free from legal error regarding its interpretation and application of 19 *Del. C. §* 2322(g). Therefore, for the forthcoming reasons, the Board's decision is AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

The Appellant sustained an injury to her right knee in a work accident on October 4, 2016. As a result, Ms. Failing sought medical treatment from specialists at the University of Pennsylvania in Philadelphia, Pennsylvania.

Over a ten-month period the Appellant made numerous commutes to Philadelphia and incurred travel expenses, including mileage, tolls,[1] and parking.

[1] The record is silent as to a precise listing of tolls that Ms. Failing was required to pay.

Pursuant to Section 2322(g) of Title 19 of the Delaware Code, the State's insurance carrier agreed to and reimbursed the Appellant for mileage associated with her commutes that amounted to $761.20. However, the provider declined to reimburse for the Appellant's costs associated with tolls and parking that amounted to $114.75. The provider informed the Appellant that only mileage was compensable for travel to and from medical appointments pursuant to section 2322(g).

On or about March 5, 2018, the Appellant filed a motion with the Board seeking reimbursement for fees associated with tolls and parking. A hearing was held on April 11, 2018 and the Board issued its order on June 11, 2018 denying the motion. Despite the Board's assertion echoing the parties view that the request for reimbursement for tolls and parking was not in itself unreasonable, the Board found that the Appellant was not entitled to reimbursement pursuant to section 2322(g) because that subsection did not explicitly provide for tolls and parking.[2]

As a result of the Board's decision, the Appellant timely filed a notice of appeal regarding the IAB's denial on July 3, 2018.

THE PARTIES' CONTENTIONS

The Appellant contends that although section 2322(g) does not specify that tolls or parking expenses are compensable, those expenses are implicit pursuant to *Mosley v. Bank of Delaware*,[3] and in accordance with the Legislature's purpose to construe the Workers' Compensation Act ("the Act") liberally.[4] The crux of the Appellant's argument is that the IAB failed to act on implicit authority granted

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[2] Appellant Ex. A.

[3] 372 A.2d 178 (Del. 1977).

[4] Appellant. Brief at 6.

pursuant to the Act because of the Board's mistaken belief that it could not grant reimbursement for tolls and parking incurred during commutes to Philadelphia.[5]

The State, in opposition, contends that the Board correctly applied section 2322(g) and that their decision is free from legal error.[6] The State argues that the Appellant asks the Court to find ambiguity in section 2322(g) where none exists, and thus create new liability on employers that is not based in the Act or Delaware law."[7] The State further asserts that any interpretation of an expanded, implicit right to traveling expenses beyond mileage ignores the fundamental rules of statutory interpretation and construction and would expand the Act in a way that is only reserved to the Legislature, namely, by passing an amendment or enactment.[8]

STANDARD OF REVIEW

The Court's appellate review of an IAB decision is limited. In an IAB appeal, the Court must determine whether the Board's decision is supported by substantial evidence[9] and is free from legal error.[10] The Court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[11] The Court reviews questions of law, such as the

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[5] Appellant Reply at 2.

[6] Appellee Reply at 6.

[7] *Id.*

[8] *Id.* at 6-7.

[9] *Glanden v. Land Prep, Inc.*, 918 A.2d 1098, 1100 (Del. 2007) ("Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994)).

[10] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.1965).

[11] *Glanden*, 918 A.2d at 1100.

construction of the Act, *de novo*.[12]

DISCUSSION

This appeal is based on the Appellant's assertion that the IAB's decision was in legal error regarding its interpretation and application of 19 *Del. C. §* 2322(g).

A. The Law of Statutory Construction in Delaware

The Court precedes its analysis of the Board's interpretation of section 2322(g) by reviewing the general standards of statutory construction in Delaware.

In the event the Court is faced with a question of statutory interpretation and construction, as in the present appeal, the Court "must seek to ascertain and give effect to the intention of the Legislature as expressed in the Statute itself."[13] The Court presumes the Legislature inserted all statutory provisions for a useful purpose and construction.[14] Where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it."[15] The Court does, and may not, assume that any such omission was the result of oversight.[16] In these instances, the Court may not substitute its own language in a statute when it has been clearly excluded by the Legislature."[17]

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[12] *Christina Care Health Services v. Palomino*, 74 A.3d 627, 629 (Del. 2013) (citing *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del.2007).

[13] *Kofron v. Amoco Chemicals Corp.*, 441 A.2d 226, 230 (Del. 1982) (quoting *Keys v. State*, 337 A.2d 18, 22 (Del. 1975)).

[14] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citing *C & T Associates, Inc.*, 408 A.2d 27, 29 (Del. Ch. 1979)).

[15] *Id.*

[16] *Id.*

[17] *Id.*

The Court interprets statutory words by commonly understood meanings.[18] If the language is unambiguous, then the word's plain meaning controls[19] and no further statutory interpretation or construction is necessary.[20] If, however, any ambiguity exists, then the Court is authorized to exercise its judicial discretion to construe the language according to general standards of statutory interpretation.[21]

B. Section 2322(g) is Clear and Unambiguous - IAB's Decision was Free from Legal Error

The Appellant asserts that section 2322(g) should be read in conjunction with sections 2243 and 2253 and that to interpret 2322(g) as not including tolls and parking would fly in the face of the Legislature's purpose to construe the Act liberally. The Court is not persuaded by the Appellant's argument because section 2322(g) is clear and unambiguous concerning mileage being the only authorized and compensable reimbursement available under the section. As a result, the Board's decision will be affirmed.

The Act was passed for the benefit of employees who are injured during the

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[18] *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1260 (Del. 2013) (citing *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 495 (Del.2012). *See also* 1 *Del.C. §* 303 (Words and phrases shall be read with their context and shall be construed according to their common and approved usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.).

[19] *Poole v. State*, 77 A.3d 310, 317 (Del. Super. 2012) (citing *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000).

[20] *General Motors Corp. v. English*, 1992 WL 207273, at *2 (Del. Super. Aug. 12, 1992) (citing *Giuricich*, 449 A.2d at 238)).

[21] *Id.*

course and scope of their employment.[22] Any existing employee compensation right(s) under the Act, must be stated either *explicitly or implicitly* within the framework of the Act.[23] If any reasonable doubts are present regarding an explicit or implicit right, the Court will liberally interpret the Act "*to resolve any reasonable doubts in favor of the worker*"[24] and to avoid mischievous or absurd results.[25] As will be demonstrated below, section 2322(g) contains no reasonable doubts, and thus, the Court is not required to liberally interpret this section of the Act.

I. The cause and purpose behind the amendment adding 2322(g).

Our Supreme Court has established that 19 *Del. C. §* 2322 defines services employers are required to provide to their injured employees.[26] When section 2322 was initially signed into law however, subsection (g) was not included. In 1999, that changed.

The Delaware General Assembly, in response to an IAB decision ruling that insurance carriers were no longer obligated to pay mileage expenses for individuals who were required to travel for medical services, amended section 2322 by adding subsection (g).[27] The Legislature's clear intent was to correct inequality caused by the

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[22] *Poole*, 77 A.3d at 317 (citing *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006). .

[23] *Mosley*, 372 A.2d at 179.

[24] *Poole*, 77 A.3d at 317 (citing *Hirneisen*, 892 A.2d at 1059) (emphasis added).

[25] *Id.*

[26] *General Motors Corp. v. Burgess*, 545 A.2d 1186, 1192 (Del. 1988).

[27] S.B. 47, 140th General Assemb. (Del. 1999).

IAB ruling.[28] Their solution, codified by subsection (g), mandated a requirement that bound insurance carriers to reimburse injured employees with a reasonable mileage expense, based upon the [State of Delaware][29] mileage reimbursement rate.[30] Since 1999, 19 *Del. C. §* 2322(g) has provided that:

> *[a]n employee shall be entitled to mileage reimbursement* in an amount equal to the State specified mileage allowance rate in effect at the time of travel, *for travel* to obtain:
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> (1) Reasonable surgical, medical, dental, optometric, chiropractic and hospital services; and
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> (2) Medicine and supplies, including repairing and replacing damaged dentures, false eyes or eyeglasses, and providing hearing aids and prosthetic devices.[31]

In this case, section 2322(g) is clear, unambiguous, and cannot be reasonably interpreted in any other manner other than its plain meaning.[32] In other words, there are no reasonable doubts regarding the meaning of the term "mileage." As such, the Appellant is entitled to reimbursement for the mileage pursuant to her medical treatment in Philadelphia. No more, no less. Here, that amounted to $761.20. The Appellant has been reimbursed that precise amount. And because the Court is only

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[28] *See Id.*

[29] "State of Delaware" was added in lieu of the words "Internal Revenue Service," which was originally proposed.

[30] S.B. 47, 140th General Assemb.

[31] 19 *Del. C. §* 2322(g).

[32] *See* 29 *Del. C. §* 7102 (the authorized mileage rate for employees of the State, State agencies and departments, shall be 40 cents per mile.).

required to liberally interpret the Act in favor of the employee when there are reasonable doubts whose meaning must be resolved, the Court finds that the Board's decision was in accordance with the intent of our Legislature.[33] And despite the fact that the Appellant correctly identifies other sections of the Act that provide reimbursement for "travel expenses," this is irrelevant as the Court reasonably assumes that the Legislature was, and is, aware of its choice of statutory language, and thus, fully intended section 2322(g) to reflect only mileage as compensable.

Even if the Court chose to read section 2322(g) in conjunction with sections 2353 and 2343, the Court would come to the same result. Section 2353 concerns grounds that employers may raise, under certain codified circumstances, that involve an employee's forfeiture of benefits.[34]

The Appellant has based the crux of her argument on our Supreme Court's ruling in *Mosley* and urges us to expand *Mosley* to encompass section 2322(g). The State concedes that pursuant to section 2353, as written post 1975, it is arguable that travel expenses would include reasonable mileage, parking fees, and toll costs.[35] Nevertheless, the State contends that Mosley is inapplicable to the instant case. Here, the Court agrees with the State's contention that *Mosley* is inapplicable to this specific case.

Section 2353 provides, in pertinent part:

> [w]here rehabilitation services require residence at or near the public or private agency away from the employee's customary residence, reasonable costs of

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[33] *See Poole*, 77 A.3d at 317.

[34] *See* 19 *Del. C. §* 2353.

[35] Appellee Reply at 12.

board, lodging and travel shall be paid for by the employer.[36]

Section 2353 was amended in 1975 to include the above mentioned paragraph in subsection (a).

However, the *Mosley* court found an implicit requirement in section 2353 for the employer to pay travel expenses where it was necessary to assure the means of bringing the employee to a service.[37] The *Mosley* court recognized that:

> [M]edical service, including vocation rehabilitation, is "tendered" within the meaning of § 2353 when, if needed, reasonable means or funds are provided by the employer to bring the employee and the service together.[38]

The Court further stated:

> [R]eason and fairness require that the employer assure the means of bringing the employee to the service. Otherwise, the tender offer would often be meaningless, and forfeiture of compensation would be the grossly unjust result of financial inability to travel to the place of the service.[39]

From this language, it is evident that the *Mosley* court found it of paramount importance that the services be offered and that they be accessible to the employee.

However, for the sake of comparison, the Court finds guidance provided by our Supreme Court in *General Motors Corp. v. Burgess.*[40] In *Burgess*, the issue was whether reasonable medical services under section 2322(a) was implicitly expanded

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[36] *Id.* at § 2353(a).

[37] *Mosley*, 372 A.2d 178, 180.

[38] *Mosley*, 372 A.2d at 179.

[39] *Id.* at 180.

[40] 545 A.2d 1186 (Del. 1988). The Court uses Burgess as an illustration only and acknowledges that it is not precisely on point with the instant case.

to include vocational rehabilitation education as an additional obligation of the employer.[41]

The appellee contended that when the General Assembly amended 19 *Del. C.* § 2353(a) to include "vocational rehabilitation services" within the definition of "medical services," it demonstrated a legislative intent to include vocational rehabilitation services within the definition of "medical services" in Section 2322(a). In other words, the appellee in *Burgess*, like the Appellant in the instant case, argued that the language in section 2353, albeit vocational rehabilitation, was the basis for an implicit right under 2322. The appellant, however, contended that the Board had no authority under section 2322 to make such an order[42] and argued that section 2322 was clear and that the term "medical services" could not be interpreted by the Board to encompass a vocational rehabilitation service.[43]

The *Burgess* court found, in the context of that appeal, that sections 2322 and 2353(a) were not parallel because each section served a different purpose.[44] The *Burgess* court, citing *Mosley*, noted that Sections 2322 and 2353(a) were "parallel"

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[41] *Burgess*, 545 A.2d at 1189 (another issue, whether the Board was correct to award separate attorney's fees to Burgess pursuant to 19 *Del. C.* § 2127(a), is not applicable to the current appeal).

[42] *Burgess*, 545 A.2d at 1188.

[43] *Id.* (The appellant further countered that when the General Assembly amended section 2353(a) regarding vocational rehabilitation services within the definition of medical services, there was no implicit amendment of the definition of medical services in section 2322(a) because the two sections of the Act addressed different concerns. *Id.* at 1187.).

[44] *Id.* at 1191-92 (Each section serves a different purpose. Section 2322 is a part *1192 of Sub-chapter II of the Delaware Workmen's Compensation Law. Section 2322 defines the scope of services that an employer shall be required to furnish to an injured employee. Section 2353 is a part of Sub-chapter III and provides an employer with relief from his statutory obligations, as defined by Section 2322, against an employee who refuses to accept reasonable services tendered by the employer.).

with regard to the employer's duty to provide and the employee's duty to accept medical services.[45] While *Mosley* did not address the question of whether an employer could be required to provide vocational rehabilitation services, the Court implicitly recognized that the employer was not under a duty to provide vocational rehabilitation services.[46] Instead, *Mosley* indicated that the employee was under a duty to accept vocational rehabilitation services should they be tendered by the employer.[47] Thus, the *Burgess* court noted that the parallel identified by *Mosley* did not permit the Court to read Section 2322 as having been implicitly amended to incorporate the explicit amendments of Section 2353(a) made in 1972 and 1974.

Additionally, the Legislature has treated the rights and obligations of employees and employers as separate and distinct concepts. Section 2353(a) was amended in 1974 when the Legislature added the second paragraph.[48] Despite the fact that the Superior Court had held, in a reported opinion, that employers had no obligation to pay travel expenses for employee-initiated medical examinations, Section 2322 was not amended until two years later.[49]

Furthermore, when the General Assembly amended the Act to require employers to pay employee expenses for employer-initiated vocational rehabilitation, the Legislature's amendment of Section 2353(a) closely paralleled similar provisions found in 19 *Del. C. §* 2343. Section 2343, also found in Sub-chapter III, outlines the

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[45] *Id.* at 1192 (citing *Mosley*, 372 A.2d at 179-80).

[46] *Id.*

[47] *Id.*

[48] *See* Supra n. 37.

[49] *Burgess*, 545 A.2d at 1192; *see also M & M, Inc. v. Wade*, 297 A.2d 403, 405 (1972) overruled by *Mosley*, 372 A.2d at 180.

employer's rights and obligations under the Act.[50] The employer must pay the cost and travel expenses incurred by the employee as a result of those medical examinations.[51] However, the employee does not have a reciprocal right to demand such examinations at the employer's expense.[52]

The Court has walked through this extensive illustration but in sum, it appears that although our Legislature, in the past, required employers to pay all costs related to employer demands on an employee, it has not given employees the right to make reciprocal demands at employer expense.[53] As a result, this makes it more compelling that the Legislature had a specific intent in its choice not to use that broad term in the 1999 amendment adding subsection (g) to section 2322. Even if the Court felt otherwise, the law demands that the Court must assume that the Legislature amended section 2322 with the intent to use the specific term "mileage," despite the knowledge that section 2353 used the broader term "travel expenses." Any antinomy in the present Workmen's Compensation Law scheme of employee rights and benefits must be resolved by statute and not by judicial fiat.[54]

As a result, the Board correctly interpreted this statutory language and found that the Appellant's only compensable option for reimbursement was to be

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[50] Section 2343 provides for employer-requested medical examinations of a disabled employee.

[51] To the extent *M & M, Inc.* was interpreted to exempt an employer from paying for travel expenses for employer-initiated activities, it was overruled in *Mosley*.

[52] In the past, employers have agreed to voluntarily provide vocational rehabilitation services to employees. *See, e.g., Seaford Feed Co., Inc. v. Moore*, 537 A.2d 184, 185 (Del. 1988). They may continue to do so in the future

[53] *Burgess*, 545 A.2d at 1192.

[54] *Id.* at 1193-94 (citing *Chrysler Corp. v. State*, 457 A.2d 345, 349 (Del. 1983)).

reimbursed in the amount of $761.20. The Court further declines the Appellant's invitation to read section 2322(g) in conjunction with both sections 2353 and 2343.[55]

A statute is unambiguous when "there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words."[56] Since Section 2322(g) is plainly unambiguous, the Court finds that the Board correctly interpreted and applied the law to its decision. Thus, the Board's decision is free from legal error and is affirmed.

CONCLUSION

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

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[55] The Burgess analysis is equally applicable to section 2343.

[56] *Andreason v. Royal Pest Control*, 72 A.3d 115, 124 (Del. 2013) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del.1985)).